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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 340

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO
HAVERHILL TYPOGRAPHICAL UNION No. 38
WORCESTER TYPOGRAPHICAL UNION No. 165, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR REHEARING OR TO AMEND THE MANDATE

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1. On April 17, 1961, this Court handed down its opinion in this case. It stated (Slip Opinion, page 2) that

> "We turn then to the controversy over the foreman clause. As to whether the strike to obtain the foreman clause was permissible, the Court is equally divided. Accordingly, the judgment on that phase of the controversy is affirmed."

This petition is addressed solely to that issue, (question #2 in the Petition for Certiorari) and to the footnoted issues, which were not passed on by the

Court.[1] We urge that the Court grant rehearing, set the case for reargument and determine the issues which, perforce, remain unresolved in consequence of the equal division of the Court. *Etting* v. *Bank of the United States*, 11 Wheat. 59, 78; *Hertz* v. *Woodman*, 218 U.S. 205, 213. This course has frequently been followed where a full court would be available for the reargument, as we assume is the situation here. See, *e.g.*, *Gray* v. *Powell*, 312 U.S. 666, 313 U.S. 596, 314 U.S. 402; *Halliburton Co.* v. *Walker*, 326 U.S. 696, 327 U.S. 812, 329 U.S. 1; *Ladner* v. *United States*, 355 U.S. 282, 356 U.S. 969, 358 U.S. 169.

The issue whether the demand for a contract clause requiring the union membership of a foreman is a permissible strike issue is of considerable practical importance. Congress, in enacting the 1947 amendments, was particularly concerned with the status of supervisors under the Act. In many industries, particularly those which were organized by craft unions prior to the Wagner Act, collective bargaining agreements traditionally have provided that the foreman shall be a union member. As the record shows (R. 272-74, 299) there are important economic reasons

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[1] See Petition for Certiorari, pp. 2-3. The Board's order, as affirmed by the Court of Appeals, may be read to forbid insistence on the foreman clauses *in toto*, including the provisions prescribing the duties of the foreman and protecting him from discipline by the union. (R. 527, 528). Since the unfair labor practices found, as sustained by an equally divided Court, pertain only to the requirement of union membership, the Court should direct that the order be modified accordingly. See pp. 41-42 of our main brief. The other footnoted issue, the responsibility of the International, also merits consideration. Since the legality of the General Laws clause has now been sustained, and there is no finding that the ITU insisted that its locals adopt the foreman clause, attribution of responsibility to the ITU is without foundation in law or this record.

in this industry for having foremen who are union members, a fact not controverted by either the employers, the Board or the First Circuit in this case. See also cases and treatises cited at p. 35, n. 23 of Petitioners' Brief.

An additional question of considerable general importance is subsumed in this issue: May a strike for a contract proposal be forbidden, although the parties could lawfully agree upon that proposal? When the original briefs in this case were filed, attention was necessarily directed principally to the legality of the proposals, the decisions of the Board and the Court below having been predicated on their illegality. Now that this Court has held in the companion *News Syndicate* case (#339, this Term) that the foreman clauses are lawful, this question is presented in sharp focus. A determination that a union may not strike for lawful proposals (which is the present result in this case) would have serious implications for collective bargaining. If one party is denied the use of economic power with respect to a proposal, its acceptance or rejection is left entirely to the unilateral determination of the other party. We submit that this is contrary to the traditions of collective bargaining as developed in *NLRB* v. *Insurance Agents Union*, 361 U.S. 477[2], and would extend the limitations on the right to strike beyond those delineated in *NLRB* v. *Drivers Local Union*, 362 U.S. 274.

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[2] "And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations." Id. at 490.

What has already been decided also clarifies another matter, intimately related to the right to strike: As this case now stands, the unions are found guilty of an unfair labor practice, by engaging in a strike which was admittedly for many proposals, all of them lawful. See pp. 40-41 of our opening brief.

2. If the Court chooses not to grant reargument we urge that it amend its mandate to direct the Court below to remand the case to the Board for reconsideration in the light of the decision in *News Syndicate* and on the General Laws clause in this case. We submit that this course is required by settled principles of the proper relationship between the courts and administrative agencies. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80; 332 U.S. 194; *American Trucking Associations* v. *United States*, 364 U.S. 1.

The Board's order on the foreman clause was based, as we read it, and as the Board in its brief to this Court read it, on the premise that the foreman clause was unlawful. (R. 449). The decision in *News Syndicate* has destroyed this premise. Accordingly, the Board's order may not be enforced on other grounds; the Board must be given the opportunity to determine in the first instance whether it would have achieved this result despite the holding that the foreman clause is lawful. *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 87; *American Trucking Associations* v. *U.S.*, 364 U.S. 1, 13-14. Even if the Board's decision is not viewed as resting entirely on the illegality of the clause, the uncertainty as to its meaning—on which the Court below expressly remarked (R. 521)—necessitates a remand.[3] *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94-95; 332 U.S. 196-97.

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[3] This point was preserved in the Petition for Certiorari and discussed in the briefs. See Pet. pp. 13-14, Brief for Petitioners, p. 30.

While it is the decision of the Board which is under review, we note also that the opinion of the Court of Appeals, enforcing this part of the Board's order, was based on two premises, of which one is undermined by this Court's decision in *News Syndicate*,[4] and the other is unsupported by either findings or record evidence.[5]

Moreover, the Board has not considered whether the strike may be held to be unlawful although the foreman clause was not its sole, indeed not even its major, object. Since the Board had found that the jurisdiction, laws and foreman clauses were each unlawful it did not particularize further as to which of these was the principal object of the strike. Indeed, there was a finding that the jurisdiction clause was the "primary" point of dispute among the parties and another, inconsistent finding that the jurisdiction, foreman and laws clauses were the "primary" objects. (Compare

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[4] The First Circuit said that the clause "would also give the union power to force the discharge or demotion of a foreman by expelling him from the union." (R. 522). In *News Syndicate* this Court held that the provision of the contract that "The union shall not discipline the foreman for carrying out the instructions of the publishers," (which was also contained in the proposals here, R. 350, 403) made the foreman solely the agent of management (slip. op. pp. 1, 4). See also 279 F.2d 323, 330.

[5] The First Circuit said that the clause would "limit the employers' choice of foremen to union members." (R. 521-2). There is no such finding by the Board. See Reply brief, p. 21. Indeed, the objection of the employer in Worcester, to the extent it was articulated, was based on the ground of illegality which was rejected in *News Syndicate* (R. 433). This illustrates, we believe, the danger of determining the legality of contract language (and *a fortiori* of strikes for such language) before the parties have had an opportunity to clarify their intentions by their conduct pursuant thereto. See *Local 357* v. *NLRB*, Nos. 64 and 85, concurring opinion, pp. 1-2.

R. 444 with R. 458): Further, since the Board often decides not to enter a remedial order even where an unfair labor practice has been found, when that practice is an insignificant part of a transaction, we think that these principles of administrative law require that the Board be given the opportunity to determine whether it will exercise its discretion in this case after the major portions of its order have been set aside. *Phelps Dodge Co.* v. *NLRB*, 313 U.S. 177, 196-200; *American Trucking Associations* v. *United States*, 364 U.S. 1, 16-17. This, indeed, was the course taken by the Second Circuit in *News Syndicate*, 279 F.2d 323, 334, and by the District of Columbia Circuit in *Honolulu Star-Bulletin, Ltd.* v. *NLRB*, 274 F. 2d 567, 571-72. It should, of course, be open to the Board on remand to reconsider the responsibility of the International and all other issues which were not disposed of by a majority of the Court in this case and *News Syndicate*, *supra*. *FCC* v. *Pottsville Broadcasting Corp.*, 309 U.S. 134; *Ford Motor Company* v. *NLRB*, 305 U.S. 364.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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SUPREME COURT OF THE UNITED STATES

No. 340.—October Term, 1960.

International Typographical Union, AFL–CIO, Haverhill Typographical Union No. 38 and Worcester Typographical Union No. 165, Petitioner, v. National Labor Relations Board.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 17, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

This case involves a controversy that started in 1956 between petitioner Local 165 and the Worcester Telegram and between petitioner Local 38 and Haverhill Gazette. The two unions insisted that the collective bargaining agreements that were being negotiated contain clauses or provisions to which each employer objected. The controversy as it reaches here is reduced to two clauses: *first*, that the hiring for the composing room be in the hands of the foreman; that he must be a member of the union; but that the union "shall not discipline the foreman for carrying out written instructions of the publisher or his representative authorized by this Agreement"; and *second* that the General Laws of the International Typographical Union shall govern the relations between the parties if they are "not in conflict with state or federal law." The unions' demand that these clauses be included in the agreement led to a deadlock in the negotiations which in turn resulted in a strike.

The employers filed charges with the Board, complaints were issued, the cases consolidated, and hearings held. The Board concluded that the demands for the

two clauses and the strikes supporting them were violations of the Act. It found that a demand for a contract that included those clauses was a refusal to bargain collectively within the meaning of § 8 (b)(3) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, 29 U. S. C. § 138 (b)(3). It found that striking to force acceptance of those clauses was an attempt to make the employers discriminate in favor of union members contrary to the command of § 8 (b)(2) of the Act. It also found that striking for the "foreman clause" was restraining and coercing the employers in the selection of their representatives for the adjustment of grievances in violation of § 8 (b)(1)(B) of the Act. 123 N. L. R. B. 806. The Court of Appeals enforced the Board's order apart from features not material here. 278 F. 2d 6. The case is here on certiorari, 364 U. S. 878.

What we have said in *Labor Board* v. *News Syndicate Co.*, decided this day, *ante*, p. —, is dispositive of the clause which incorporates the General Laws of the parent union "not in conflict with state or federal law." On that phase of the case the judgment below must be reversed.

MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER dissent, substantially for the reasons stated by the Court of Appeals, 278 F. 2d 6.

We turn then to the controversy over the foremen clause. As to whether the strike to obtain the foremen clause was permissible, the Court is equally divided. Accordingly the judgment on that phase of the controversy is affirmed.

Reversed in part and affirmed in part.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 340.—October Term, 1960.

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[April 17, 1961.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

I join the Court's opinion upon the basis set forth in my concurring opinions in No. 339, *ante*, p. —, and in Nos. 64 and 85, *ante*, p. —.